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COURT OF CRIMINAL APPEALS
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IN THE TEXAS COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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ANDREAS MARCOPOULOS,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE
FIRST JUDICIAL DISTRICT OF TEXAS
AT HOUSTON

On Appeal from Cause No. 1440970
In the 248th District of
Harris County, Texas

APPELLANT'S MERITS BRIEF

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ORAL ARGUMENT REQUESTED

IDENTIFICATION OF INTERESTED PARTIES

Pursuant to TEX.R.APP.P. 28.1(a), a complete list of the names and addresses of all interested parties is provided below so the members of this Honorable Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of this case.

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Trial Judge:
Judge Katherine Cabiness
248th District Court
Harris County Texas

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STATEMENT REGARDING ORAL ARGUMENT

Although this Court has ordered this case be submitted without oral argument, the issues presented regarding whether any of the three exceptions to the warrant requirement apply to the facts of this case lend themselves to argument, which Mr. Marcopolous contends would significantly assist this Court in its decision-making process. Therefore, oral argument is requested.

STATEMENT OF THE CASE

Mr. Marcopolous was charged with the felony offense of possession of a controlled substance in the 248th District Court of Harris County, Texas. He filed a pretrial motion to suppress that was denied and thereafter pled guilty and was placed on deferred adjudication probation for three (3) years.

Mr. Marcopolous timely appealed to the First Court of Appeals and on appeal argued in four issues that, *inter alia*, the trial court abused its discretion by denying his motion to suppress illegally obtained evidence resulting from the warrantless search of his truck and wallet. On appeal, the State responded that Mr. Marcopolous did not have standing to challenge his unlawful search.

The First Court of Appeals issued a divided, published opinion affirming the trial court's decision denying his motion to suppress. The court of appeals' majority opinion did not reach the claims raised by Mr. Marcopolous and instead held that the search of his truck and wallet were valid pursuant to the automobile

exception to the warrant requirement. Mr. Marcopolous filed a motion for en banc reconsideration that was denied with Justices Jennings, Keyes, and Lloyd dissenting.

Mr. Marcopolous filed a petition for discretionary review (PDR) in this Court that was granted with briefing on three issues pertaining to the search of Mr. Marcopolous' truck and wallet. After one extension of time was granted, his brief is due on or before March 13, 2017.

ISSUES PRESENTED

1. *Whether there was probable cause to search Appellant's vehicle under the automobile exception to the warrant requirement when he entered a bar where narcotic activity was suspected, left three to five minutes later, and made "furtive gestures" when police surrounded him to make a traffic stop?*

2. *Whether there was probable cause to search Appellant incident to arrest for drugs when he was handcuffed, immediately arrested, and placed in the back of a patrol car for minor traffic offenses?*

3. *Can an inventory search be upheld where there is no testimony or documentation in the record as to any items that were inventoried, other than the contraband found?*

STATEMENT OF FACTS

While conducting surveillance at a Houston bar known for narcotics activity, Officer Oliver observed Mr. Marcopolous drive up in his truck, enter the bar, and leave within three to five minutes. Op at 2. At the suppression hearing, Officer Oliver testified he had seen Mr. Marcopolous at the bar before but did not state under what circumstances and did not testify he observed any illegal activity on any prior occasion. Thereafter, Officer Oliver followed Mr. Marcopolous and observed him change lanes on the two-lane roadway without signaling. Officer Oliver then called ahead to his uniformed officer to perform a traffic stop of Mr. Marcopolous' vehicle. Op at 2. In addition to Officer Oliver, Officer Villa in a marked unit pulled behind Mr. Marcopolous and observed him making "furtive gestures" around the center console of his truck. Officer Oliver testified he also saw the "furtive gestures" from his vehicle while stopped at the traffic light. When the light turned green, Officer Villa observed that Mr. Marcopolous failed to signal his left turn within 100 feet of the intersection. Base on this observation Officer Villa activated his emergency lights to stop him. Op. at 2.

Once pulled over, Officer Villa testified he immediately removed Mr. Marcopolous from his truck and placed him under arrest for traffic violations. Op. at 2. Officer Villa handcuffed Mr. Marcopolous and placed him in the back of a patrol car. While Officer Villa arrested and secured Mr. Marcopolous, his partner,

Officer Rogers started "inventorying" his truck where he found a small baggie of cocaine between the passenger seat and center console, and another little baggie in the center console. After finding the cocaine, he discontinued any further "inventory" of the truck and no documentation of any "inventory" was created. Officer Villa testified it is their policy to tow a vehicle when a person is under arrest rather than leave it where it's parked and that the search of Mr. Marcopolous' vehicle was done to "inventory" it to be towed. After officers retrieved the cocaine from his truck, Officer Villa then searched Mr. Marcopolous' wallet looking for contraband when he found a small baggie of cocaine. Mr. Marcopolous was arrested for possession of less than one gram of cocaine based on the search of his truck and wallet.[1]

SUMMARY OF THE ARGUMENTS

I. Automobile Exception

In this case, the evidence supporting probable cause that a crime was being committed or contraband would be found in Mr. Marcopolous' truck was based on "furtive gestures" made by him when he was being stopped by police, coupled with Officer Oliver's speculation about his purpose in going into a bar for three to five minutes and then leaving. For this reason, and based on well-established case law from this Court, there was insufficient probable cause in this case to justify the

[1] It is not clear which, if any, of the "little baggies" were allegedly purchased at the bar.

automobile exception to the warrant requirement. Therefore, because police did not have probable cause when Mr. Marcopolous entered a bar under surveillance for narcotic activity, left three to five minutes later and made "furtive gestures" when police surrounded him to initiate a traffic stop, the automobile exception does not justify the State's failure to secure a warrant before searching Appellant's vehicle.

II. Search Incident to Arrest

Mr. Marcopolous was immediately arrested, handcuffed and placed secured in a police car for committing traffic infractions. "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the [exception] does not apply." *Gant*, 556 U.S. at 333, 129 S.Ct 1710, 1716 (2009), *Knowles v. Iowa*, 525 U.S. 113, 116-117, 119 S.Ct. 484, 487 (1998). In this case, there was no concern that Mr. Marcopolous could access a weapon nor could destroy evidence, therefore the exception does not apply. In addition, police testified that Mr. Marcopolous' wallet was searched after he was arrested to search for evidence of credit card theft but instead revealed a small baggie of cocaine. For all these reasons, the unlawful search of Mr. Marcopolous' truck and wallet incident to arrest for failing to signal a lane change clearly exceeded the scope of a warrantless search incident to that arrest, and there is a violation of his Fourth Amendment right to be free from unreasonable searches and seizures.

III. Inventory Search Exception

Finally, the State failed to demonstrate Officer Villa and his partner conducted an inventory search in accordance with standardized procedures. Significantly, too, while the inventory exception is designed to create an "inventory" to protect property and allegations against police, in this case, nothing was "inventoried" except the contraband collected from his truck. Therefore, because there was no standardized procedure followed in this case and because no inventory was ever conducted, except to collect contraband from his vehicle and wallet, this exception to the warrant requirement cannot justify this warrantless search and seizure.

ISSUE NUMBER ONE (RESTATED)

> *Whether there was probable cause to search Appellant's vehicle under the automobile exception to the warrant requirement when he entered a bar where narcotic activity was suspected, left three to five minutes later, and made "furtive gestures" when police surrounded him to make a traffic stop?*

ARGUMENT AND AUTHORITIES

A. Standard of Review

Searches conducted without a warrant of either a person or property are considered *per se* unreasonable subject to only a few specifically defined and well-established exceptions. *McGee v. State*, 105 S.W.3d 609, 615

(Tex.Crim.App.2003). Well-recognized exceptions like a search incident to a lawful arrest, a properly conducted inventory search and the automobile exception are often relied on by the State to justify its failure to secure a warrant before conducting a search. When a search is conducted without a warrant, the State carries the burden in a motion to suppress to establish the application of any exception to the warrant requirement. *Id.* A trial court's ruling on probable cause is entitled to almost total deference on appeal as long as there is a substantial basis in the record to support its ruling. *State v. Duarte*, 389 S.W.3d 349, 354 (Tex.Crim.App.2012).

Like other exceptions to the warrant requirement, "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338, 129 S.Ct. 1710, 1716 (2009); *McGee*, 105 S.W.3d 609, 615 (Tex.Crim.App.2003). Under the automobile exception to the warrant requirement, police may conduct a warrantless search of a vehicle if it is readily mobile and there is probable cause to believe that it contains contraband. *Id*. *State v. Guzman*, 959 S.W.2d 631, 634 (Tex.Crim.App.1998) ("A vehicle lawfully in police custody may be searched on the basis of probable cause to believe that it contains contraband…"). But the automobile exception "does not declare a field day for the

police in searching automobiles. Automobile or no automobile, there must be probable cause for the search." *Almeida-Sanchez v. United States*, 413 U.S. 266, 269, 93 S.Ct. 2535, 2537-38 (1973).

Probable cause exists when the facts and circumstances within the officer's knowledge and about which he has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution to believe that a crime has been committed. *Amores v. State*, 816 S.W.2d 407, 413 (Tex.Crim.App.1991).

B. "Furtive Gestures" Alone Are Insufficient Probable Cause

It is well settled that so called "furtive gestures" made while a person is stopped for a traffic offense do not establish probable cause for a search. *Wiede v. State*, 157 S.W.3d 87, 97 (Tex.App. – Austin, 2005, pet. ref'd.) ("The court of criminal appeals has repeatedly held that a 'furtive gesture,' such as the one described by Tambunga, made while a person is stopped for a traffic offense does not establish probable cause for a search."); see also *Howard v. State*, 559 S.W.2d 597, 604-05 (Tex.Crim.App.1979) (defendant who dipped down in seat toward steering wheel when stopped for failing to use turn signal was insufficient probable cause); *Beck v State*, 547 S.W.2d 266, 268-69 (Tex.Crim.App.1976) (defendant who reached toward glove compartment when stopped for failing to use turn signal not sufficient probable cause); *Wilson v. State*, 511 S.W.2d 531, 535

(Tex.Crim.App.1974) (defendant who moved his hands between seats when stopped for running a red light was not sufficient to establish probable cause for search of vehicle).

In this case, the evidence supporting probable cause that a crime was being committed or contraband would be found in Mr. Marcopolous' truck was based on "furtive gestures" made by him when he was being stopped by police, coupled with Officer Oliver's speculation about his purpose in going into a bar for three to five minutes and then leaving. For this reason, and based on well-established case law from this Court, there was insufficient probable cause in this case to justify the automobile exception to the warrant requirement.

In its holding that the automobile exception applied to this case, the court of appeals' opinion seemed to give great weight to Officer Oliver's testimony that he had seen Mr. Marcopolous at this particular bar on one prior occasion.[2] However, Officer Oliver's testimony at the motion to suppress hearing in fact did not provide any specific information about this observation such as how long ago it was, what the circumstances were and importantly, never alleged that Mr. Marcopolous was involved in any criminal activity on the one prior observation he had with him. Instead, Officer Oliver simply stated he had seen Mr. Marcopolous at that bar on

[2] "Given Appellant's repeated history of going to a place known for selling narcotics, his uncommonly short time spent at a bar, and his furtive gestures when he noticed a patrol car behind him, we hold there is a substantial basis in the record to support the trial court's ruling on probable cause." Op. at 10.

one prior occasion. Officer Oliver did not testify that he had knowledge from any source that Mr. Marcopolous had engaged in narcotics trafficking on any prior occasions. To the contrary, he testified that on that one prior occasion he had insufficient evidence to stop Mr. Marcopolous, which is some evidence that he was not engaged in criminal conduct that rose to the low level of reasonable suspicion of criminal activity to briefly detain him.

Without the benefit of these additional facts that were neither testified to, nor fairly supported by the record, the evidence that supports probable cause in this case is that Mr. Marcopolous entered a bar known for narcotic activity, stayed for three to five minutes and then left. The court of appeals characterized this activity as an "uncommonly short time spent at a bar", however, there was no testimony from Officer Oliver that supports the conclusion that this activity was "uncommon" and no evidence that it was indicative of narcotic activity. Therefore, in this case there was little more than "furtive gestures" to find probable cause but even when combined with other evidence that Mr. Marcopolous went into a bar and left a few minutes later, is not the type of sufficient "reliable information or other suspicious circumstances relating the suspect to the evidence of a crime" this Court has held "may constitute probable cause." *Smith v. State*, 542 S.W.2d 420, 421 (Tex.Crim.App.1976) ("The reasons supporting that rule [that "furtive gestures" are insufficient probable cause] are obvious. An innocent

movement can easily be mistaken for a guilty one. The motivation for such movements may run the whole spectrum from the most legitimate to the most heinous. It is because of this danger that the law requires more than a mere furtive gesture to constitute probable cause for a search or arrest."); *see Canales v. State,* 221 S.W.3d 194, 200 (Tex.App. – Houston [1st Dist] 2006, no pet) (automobile exception not triggered where "furtive gestures" were essentially the only evidence to establish probable cause). Therefore, this Court, consistent with its previous holdings, must conclude the automobile exception is not triggered under these specific facts because they simply do not amount to probable cause to believe a crime was committed.

Significantly, too, most automobile exception cases that relied on "furtive gestures" included some other compelling evidence such as contraband in plain view of officers or were based on a reliable confidential informant to support probable cause. *See Wiede*, 157 S.W.3d at 98 (automobile exception applied where police who were assisting at accident scene where officer observed defendant, reach over his body and remove a plastic bag from his pocket, and place it between his seat and console that officers testified based on training appeared to contain some type of contraband or controlled substance); *Hayward v. State*, No. 01-08-00949-CR, 2009 WL 1813185 *3, (Tex.App. – Houston [1st Dist.] Jun 25, 2009, pet. dismissed) (not designated for publication) (automobile exception applied

where police observed defendant take a bottle of PCP from his pocket and police observed passenger remove the door panel to secrete the drugs); see also *Leach v. State*, No. 01-94-00836-CR, 1996 WL 38065 *3, , (Tex.App. –Houston [1st Dist.] Feb. 1, 1996, no pet) (not designated for publication) (holding automobile exception applied where confidential informant provided police with tip that car contained contraband); *Lee v. State*, No. 01-95-01084-CR, 1996 WL 227391 *2 (Tex.App. – Houston [1st Dist.] May 2, 1996, no pet.) (not designated for publication)). For all these reasons, the "furtive gestures" in this case when Mr. Marcopolous was stopped by police cannot support the great weight placed upon it by the court of appeals' opinion and does not amount to probable cause that a crime was being committed.

C. Other Than "Furtive Gestures" There Was Insufficient Probable Cause In This Pretextual Traffic Stop

As discussed *supra*, here, and as the court of appeals' dissenting opinion correctly observes, there were insufficient facts to demonstrate there was probable cause that a crime was being committed. Mr. Marcopolous was stopped for a traffic violation and arrested for a clearly pretextual purpose while police ordered him out of his vehicle, handcuffed him, secured him in a police vehicle and searched his truck and later, his wallet looking for contraband. Because there was insufficient evidence that he committed any crime, other than the traffic infraction he was arrested for at the scene, the automobile exception does not apply. *See State*

v. Bowman, No. 2-09-140-CR, 2010 WL 2813504 *2 (Tex.App. – Fort Worth, July 15, 2010, pet. dismissed) (the holding in *Gant* affirms the viability of automobile exception but does not mean it automatically applies where defendant was stopped on traffic, immediately arrested and placed in police car and where the state's evidence of probable cause is officers collective observation of him exchanging a black plastic bag with a person in another vehicle in a parking lot, the evidence is insufficient to establish probable cause).

So, too, the court of appeals' reliance on inapposite case law only reinforces the fact that this case demonstrates insufficient probable cause to trigger the automobile exception. In *Kelly v. State*, the court held there was reasonable suspicion to justify an investigative detention where a reliable confidential informant told police that Kelly was selling crack cocaine from his vehicle and was in possession of an assault rifle. 807 S.W.2d 810, 814 (Tex.App. – Houston [14th Dist.] 1991, pet. ref'd). Significantly, a tip from a confidential informant is the same factual basis that courts have consistently held amounts to sufficient probable cause to justify the automobile exception.[3] Importantly, those facts are not present in this case. So similarly, in *Coleman v. State*, also relied on by the court of appeals' majority opinion, involved a tip from a reliable confidential informant that he had previously purchased drugs from Coleman and that on the day in question

[3] See p. 14, *supra.*

Coleman was reported to be selling narcotics out of his home. No. 01-09-01071-CR, 2011 WL 5026182 at *4-5 (Tex.App. – Houston [1st Dist.] Oct. 20, 2011, pet. ref'd) (mem. op., not designated for publication). In addition to the informant, when officers stopped Coleman he made "furtive gestures" and police observed a bag of white powder in plain view in the center console as well as a sprite bottle that contained what officers believed to be codeine in plain view. *Id*. Here again, these facts are similar to the line of automobile exception cases from this Court and other courts of appeals holding sufficient probable cause to trigger the exception. Conspicuously, this case does not involve a confidential informant and police did not observe contraband in plain view in Mr. Marcopolous' truck.

Therefore, based on the body of case law involving the automobile exception, even when giving almost total deference to the trial court's determination, and based on a totality of the circumstances, the facts presented here simply do not support a finding of probable cause to trigger the automobile exception to the warrant requirement. At best, Officer Oliver testified that he had seen Mr. Marcopolous at the bar in the past, albeit not for a criminal purpose, and that he stayed for three to five minutes and left. As discussed *supra*, he did not testify that this behavior was consistent with buying or selling drugs. Finally, although the court of appeals concluded Mr. Marcopolous' behavior was "uncommon" this record reveals no testimony to support that characterization

except that the location was known for frequent narcotic activity, but as a lawful establishment, law-abiding citizens also frequented it as well. Therefore, the only evidence remaining to establish probable cause is Mr. Marcopolous' "furtive gestures" when one marked and one unmarked police unit surrounded his vehicle, which this Court has consistently held is insufficient probable cause for a search of his truck. Therefore, the trial court erred in denying his motion to suppress because the automobile exception to the warrant requirement was not met under these facts presented.

ISSUE NUMBER TWO (RESTATED)

Whether there was probable cause to search Appellant incident to arrest for drugs when he was handcuffed, immediately arrested, and placed in the back of a patrol car for minor traffic offenses?

A. Statement of Facts

Mr. Marcopolous incorporates by reference the statement of facts presented on pp. 7-8 *supra*.

B. Standard of Review

The State's reliance on search incident to arrest as an exception to the warrant requirement is also misplaced in this case because Mr. Marcopolous was immediately handcuffed, arrested and placed in the back of a patrol car for traffic infractions. This conclusion is reinforced by cases from the United States Supreme Court holding that a search incident to arrest "authorizes police to search a vehicle

incident to a recent occupant's arrest **only** when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Gant*, 556 U.S. at 343, 129 S.Ct. at 1719 (*quoting Thornton v. United States*, 541 U.S. 615, 632, 124 S.Ct. 2127, 2137 (2004) (Scalia, J., concurring) (emphasis added). Since neither scenario was present in this case, it does not meet the exception to the warrant requirement and therefore the trial court erred in denying his motion to suppress.

Searches incident to arrest are limited to situations where officer safety and evidence preservation are primary concerns. *State v. Elias*, 339 S.W.3d 667, 677 (Tex.Crim.App.2011); *Arizona v. Gant*, 556 U.S. 332, 338, 129 S.Ct. 1710, 1716 (2009). This limitation is designed to "ensure that the scope of the search incident to arrest is commensurate with its purpose of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." *Gant*, 556 U.S. at 333, 129 S.Ct at 1710. Therefore "[a] search incident to arrest permits officers to search a defendant, or areas within the defendant's immediate control, to prevent the concealment or destruction of evidence." *McGee,* 105 S.W.3d at 615. For this reason, there is also a "temporal and a spatial limitation on searches incident to arrest, excusing compliance with the warrant requirement **only** when the search 'is substantially contemporaneous with the

arrest and is confined to the immediate vicinity of the arrest.'" *New York v. Belton*, 453 U.S. at 465, 101 S.Ct. 2860, 2866-67 (1981) (Brennan, J., dissenting) (quoting *Shipley v. California*, 395 U.S. 818, 819, 89 S.Ct. 2053, 2054 (1969) (per curiam)) (emphasis added). "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the [exception] does not apply." *Gant*, 556 U.S. at 333, 129 S.Ct. at 1710, *Knowles v. Iowa*, 525 U.S. 113, 116-117, 119 S.Ct. 484, 487 (1998).

C. Officer's Immediately Arrested and Removed Mr. Marcopolous from His Vehicle

> In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence.

Gant, 556 U.S. at 343, 129 S.Ct at 1719; *Knowles*, 525 U.S. at 118, 119 S.Ct 487.

In this case, Officer Villa testified that Mr. Marcopolous was "pretty much immediately" removed from his truck, handcuffed and arrested for traffic infractions. His partner, Officer Rogers, began "inventorying" Mr. Marcopolous' truck looking for contraband. After drugs were found in his truck and after being immediately removed from his truck, handcuffed and secured in the back of the patrol car, Officer Villa searched Mr. Marcopolous' wallet looking for contraband. Further, because Mr. Marcopolous was arrested for traffic violations, officers could not expect to find further evidence of that crime in the passenger compartment of

his truck. So, too, since Mr. Marcopolous was securely in police custody and had no further access to his truck by the time officers started searching, there could be no reasonable concern that he would destroy evidence or that he might access a weapon. *See Knowles*, 525 U.S. at 117-18, 119 S.Ct. at 487-488; *Gant*, 556 U.S. at 345, 129 S.Ct. at 1720.

D. Search Exceeded the Scope of Appellant's Arrest

The search of Mr. Marcopolous' truck and wallet in this case is precisely what the United Supreme Court and this Court has determined is an unjustified search incident to arrest under *Thornton*, *Belton Gant, Knowles,* and *McGee*. Specifically, *Knowles* and *Gant* hold that officers

> "may order out of a vehicle both the driver and any passengers; perform a 'pat down' of a driver and any passengers upon reasonable suspicion that they may be armed or dangerous; conduct a '*Terry* patdown' of the passenger compartment of a vehicle upon reasonable suspicion that an occupant is dangerous and may gain immediate control of a weapon; and even conduct a full search of the passenger compartment, including any containers therein, pursuant to a custodial arrest."[4]

Relying on the Supreme Court, Justice Keyes further succinctly states that "[w]hat police officers may *not* do,

> "even when they conduct a search incident to a lawful custodial arrest of a recent occupant of a vehicle, is to search the vehicle when the arrestee is secured and not within reaching distance of the passenger

[4] *Knowles*, 525 U.S. at 118, 119 S.Ct. at 488 (citations omitted).

> compartment. Nor may they pay down the driver and passengers *without* reasonable suspicion that they may be armed and dangerous."[5]

Here, Officer Villa handcuffed Mr. Marcopolous and "pretty much immediately arrested him for traffic".[6] Officer Villa searched Mr. Marcopolous for contraband and then placed him in the back of his marked police vehicle, then returned to the truck to lend a hand with "inventorying."[7] Because Mr. Marcopolous was arrested for the traffic violation of failing to signal a turn – an offense for which officers could not expect to find evidence of in his wallet or in the passenger compartment of his vehicle, the search was unreasonable. *Gant,* 556 U.S. at 343, 129 S.Ct. at 1720. In addition, because Mr. Marcopolous was safely secured in police custody and had no further access to his truck, any search incident to arrest exceeded the scope of that arrest.

For all these reasons, consistent with relevant case law, the search of Mr. Marcopolous' truck and wallet incident to arrest for failing to signal a lane change clearly exceeded the scope of a warrantless search incident to that arrest. Therefore, these searches violated his Fourth Amendment rights against warrantless, unreasonable searches and seizures. This conclusion is consistent with the Supreme Court's decisions in *Knowles* and *Gant* where the Court expressed concern about any interpretation that creates '[a] rule that gives police the power to

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[5] Dissenting Op. at 9 (internal citations omitted) (emphasis in original).
[6] (1 RR 50).
[7] (1 RR 43).

conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, [because it] creates a serious and recurring threat to the privacy of countless individuals." *Gant*, 556 U.S. at 345, 129 S. Ct. at 1720. So, too, and as the dissenting opinion correctly observed, "[t]hat threat was realized in this case."[8].

For all these reasons, the search of Mr. Marcopolous' truck and wallet incident to his arrest for failing to signal a turn clearly exceeded the proper scope of a warrantless search incident to arrest. There simply was no rational basis, beyond supposition and speculation by officers, that Mr. Marcopolous had committed anything more than the traffic infraction he was accused of committing. Therefore, any search violated the Fourth Amendment prohibition against unreasonable searches and seizures. The trial court, therefore, abused its discretion in denying his motion to suppress this illegal search and seizure.

[8] Dissent at 10.

ISSUE NUMBER THREE (RESTATED)

Can an inventory search be upheld where there is no testimony or documentation in the record as to any items that were inventoried, other than the contraband found?

A. Statement of Facts

"Pretty much immediately" after Appellant exited the truck, Officer Villa's partner began "inventorying the vehicle and also because of the furtive gestures he was checking his 360 area making sure there wasn't a gun or something there."[9] After placing Appellant in the back seat of the marked unit, Officer Villa joined his partner to "inventory the vehicle." Officer Villa testified that it is "agency policy to tow a vehicle when the driver's under arrest and not just leave it where it's parked." Further, he testified that there is something done "in any instance if the driver's under arrest."[10]

After his partner "found the narcotics in the vehicle itself,[11] [Officer Villa] went back to the vehicle to run [Mr. Marcopolous] and then [Officer Villa] looked in [his] wallet to make sure he had [sic] any cards, credit cards or anything that wasn't under his name."[12] Inside his wallet, Officer Villa testified to finding another small baggie.[13] The baggie found by Officer Villa and the other two

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[9] (1 RR 43).
[10] (1 RR 43).
[11] Officer Villa testified that the cocaine was "actual[ly]little baggies." (1 RR 44).
[12] (1 RR 43).
[13] (1 RR 44).

baggies found by his partner were subsequently field tested by Officer Oliver, where the baggie found by Officer Villa tested positive for cocaine.[14] Mr. Marcopolous was charged with possession of less than one gram of cocaine for all three "little baggies".[15]

B. Standard of Review

Inventory searches [unlike criminal investigations requiring probable cause] "serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." *Florida v. Wells*, 495 U.S. 1, 4, 110 S.Ct. 1632, 1635 (1990) (quoting *Colorado v. Bertine*, 479 U.S. 367, 372 107 S.Ct. at 741) (1987)). Importantly, "[t]he policy or practice governing inventory searches should be designed to produce an inventory." *Id.* So, too, "[n]othing… prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." *Bertine*, 479 U.S. at 375, 107 S.Ct. at 744.

In line with Supreme Court holdings dealing with inventory searches, this Court has reiterated that "[b]y virtue of the transitory nature of the automobile several factors were recognized which made inventory searches "reasonable" under the Fourth Amendment after the vehicle was *legally impounded:* (1) the protection

[14] (1 RR 45).
[15] (1 RR 44).

of the owner's property while it remains in police custody, (2) the protection of the police against claims or disputes over lost or stolen property, and (3) the protection of the police from inherent danger." *Moberg v. State*, 810 S.W.2d 190, 193 (Tex.Crim.App.1991) (en banc) (emphasis in original); *South Dakota v. Opperman*, 428 U.S. 364, 96 S. Ct. at 3100 (1976). Further, this Court noted the consistent holding that an inventory must be "carried out in accordance with standard procedure in the police department" and should be "limited in scope to the extent necessary to carry out the caretaking function." *Id., citing see also Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523 (1973). That a standard police procedure was followed was a "factor tending to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function." *Id.*

C. Police Discretion Must be Based on Standard Criteria Designed to Produce An Inventory

For an inventory search to be lawful as a valid exception to the Fourth Amendment, the State must demonstrate that officers conducted its inventory search in good faith and pursuant to standardized police procedure. *Moberg v. State*, 810 S.W.2d 190, 195 (Tex.Crim.App.1991). To be lawful, an inventory search must not deviate from the standardized policy or procedure. *Id*.

Viewed through this prism, aside from Officer Villa's testimony that he conducted an inventory search of Mr. Marcopolous' vehicle because it is policy to inventory every vehicle where an arrest occurs, there was no further evidence of

any standardized procedure followed. Instead, the State presented the testimony of Officer Villa that it is "agency policy to tow a vehicle when the driver's under arrest and not just leave it where it's parked."[16] So, too, there was no testimony relating to any policy for how officers are supposed to conduct inventory searches, no testimony that any standard procedure was followed in this case, and no testimony or documentation of any "inventory" in this case or items recovered from Mr. Marcopolous' truck other than the contraband found. Officer Villa did not testify about whether HPD's policy required: (1) the inventorying of all valuable personal effects, or any effects found therein; or, (2) an itemized list accounting for those items left within the vehicle (e.g., a vehicle impoundment form) after conducting the search. *State v. Molder*, 337 S.W.3d 403, 410 (Tex.App. –Fort Worth, 2011, no pet.) (finding Trooper's testimony, as the sole evidence at the suppression hearing for the department policies, too "barren to show any particular standardized criteria or routine concerning the scope of the inventory."). Moreover, in reference to the type of standardized procedures justifying an inventory search this Court has emphasized the Supreme Court holding when it said:

> "Nothing … prohibits the exercise of police discretion *so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity.* Here, the discretion afforded the Boulder police was exercised in light

[16] (1 RR 43).

> of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it. *There was no showing that the police chose to impound Bertine's van in order to investigate suspected criminal activity."*[17]

For all these reasons, and because the state offered no evidence of any standardized procedures or criteria or that it was complied with in this case HPD's policy provides absolutely no "standard procedure or criteria" much less the type envisioned by the Supreme Court holdings in *Wells, Bertine*, and this Court's holding in *Moberg.* Therefore, the unlawful search of Mr. Marcopolous' truck cannot be upheld based on any "inventory" search as an exception to the warrant requirement because it was "plainly unreasonable and unconstitutional under the Fourth Amendment as a purported inventory search."[18]

For all these reasons, the trial court erred in denying his motion to suppress the illegal search and seizure of his truck.

CONCLUSION AND PRAYER

Mr. Marcopolous prays that the Court of Criminal Appeals, reverse the court of appeals' opinion and remand this case for an acquittal or alternatively a new trial consistent with its ruling.

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[17] *Moberg*, 810 S.W.2d at 195 (footnotes omitted) (emphasis in original).
[18] Dissent Op. at 13; see *Wells*, 495 U.S. at 4, 110 S.Ct. at 1635; *Bertine*, 479 U.S. at 371, 375, 107 S.Ct. 741, 743; *Moberg,* 810 S.W.2d at 195.

RESPECTFULLY SUBMITTED,

/s/ Carmen Roe

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CERTIFICATE OF SERVICE

The foregoing brief was served upon the Harris County District Attorney's Office, and State Prosecuting Attorney's Office by electronic filing on March 13, 2017.

/s/ Carmen Roe

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CERTIFICATE OF COMPLIANCE

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/s/ Carmen Roe

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